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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

FOX NEWS NETWORK, LLC,

Plaintiff,

- against -

TVEYES INC.,

Defendant.

Case No. 1:13-cv-05315-AKH

ECF Case

**PLAINTIFF FOX NEWS NETWORK, LLC'S RULE 56.1 STATEMENT OF
UNDISPUTED FACTS IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

Pursuant to Local Rule 56.1(a) and (d), Plaintiff Fox News Network, LLC (“Fox News”) by and through its counsel, respectfully submits the following statement of undisputed material facts that support a grant of Fox News’ motion for summary judgment.

I. Fox News Network, LLC

1. Fox News is an international television news organization headquartered in New York City. Declaration of Jay Wallace dated June 26, 2014 (“Wallace Decl.”) ¶ 13.

2. Fox News produces up-to-the-minute news reports with extensive commentary and analysis. Wallace Decl. ¶¶ 13, 14; Declaration of Joshua L. Simmons dated June 26, 2014 (“Simmons Decl.”) Ex. 69 (TVEyes’ Resps. to Fox News’ Requests for Admission (“RFA Resp.”) No. 63).

3. Fox News produces creative prime-time programming. Wallace Decl. ¶¶ 18, 23, 27.

4. Fox News owns and operates two news channels: Fox News Channel (“FNC”) and Fox Business Network (“FBN”). Wallace Decl. ¶ 13.

5. Fox News’ channels provide coverage of different stories throughout an hour. Wallace Decl. ¶ 30.

6. Fox News news stories are often approximately two minutes in length. Wallace Decl. ¶ 30.

7. Fox News news stories are often shorter than two minutes in length. Wallace Decl. ¶ 30.

8. Fox News’ interview segments frequently are three to five minutes in length. Wallace Decl. ¶ 30.

9. A single ten-minute interval of Fox News programming may encompass five to ten or more independent news reports. Wallace Decl. ¶ 30.

10. Each segment of Fox News' broadcasts is separately written, produced, and filmed. Wallace Decl. ¶¶ 16, 30.

11. Each segment of Fox News' broadcasts is the result of numerous creative decisions, including the selection of which story to cover, unique commentary and reporting, selection of talent, graphics, images, music, and camera angles. Wallace Decl. ¶¶ 27, 29, 31, 33, 35.

A. Fox News Channel

12. FNC is a news channel that is dedicated to delivering breaking news, as well as political and business news and information. Wallace Decl. ¶ 13.

13. FNC has been in operation since October 7, 1996. Wallace Decl. ¶ 13.

14. The decision to launch FNC was considered very risky. Declaration of Timothy Carry dated June 26, 2014 ("Carry Decl.") ¶ 5.

15. When FNC was launched, there was speculation as to whether the market could support another news channel. Carry Decl. ¶ 5.

16. When FNC was launched, numerous commentators suggested FNC would fail. Carry Decl. ¶ 6.

17. Since its launch in 1996, FNC has become the most watched news channel in the United States for more than eleven years. Declaration of Jason Villar dated June 26, 2014 ("Villar Decl.") ¶ 5.

18. FNC is available in more than 90 million homes. Villar Decl. ¶ 5.

19. FNC airs news and information programming 24 hours a day, seven days a week. Declaration of Sharri Berg dated June 26, 2014 (“Berg Decl.”) ¶ 4; Wallace Decl. ¶ 13.

20. FNC gathers and reports the latest news every hour of every day of the year. Wallace Decl. ¶¶ 12, 15–16.

21. FNC’s 24-hour news cycle requires extensive planning, investment, and creativity. Berg Decl. ¶ 4; Wallace Decl. ¶ 29.

22. Newsworthy stories continuously occur around the clock. Wallace Decl. ¶ 32.

23. Each newsworthy story requires immediate evaluation by Fox News to determine whether, how, and when to cover it. Wallace Decl. ¶ 33.

24. Many creative decisions are required to produce an FNC news segment. Wallace Decl. ¶¶ 31, 33.

25. Decisions about the point of view to take in covering a story are required to produce an FNC news segment. Wallace Decl. ¶¶ 31, 33.

26. Decisions about whether to interview witnesses, consultants, or experts are required to produce an FNC news segment. Wallace Decl. ¶ 33.

27. Decisions about which on-screen graphics to include are required to produce an FNC news segment. Wallace Decl. ¶ 33.

28. For any news story, Fox News produces multiple, different two-minute segments describing it, which can be used throughout the day. Wallace Decl. ¶ 36.

29. Fox News continues to make decisions throughout the news day as new stories break and as additional developments occur relating to earlier stories. Wallace Decl. ¶¶ 32, 36.

30. To facilitate its constant news reporting, Fox News created the first text news ticker, which appears along the lower edge of the screen and delivers the latest updates. Berg Decl. ¶ 4; Wallace Decl. ¶¶ 38–40.

31. FNC has developed a full schedule of original daytime, prime-time, overnight, and weekend programming. Wallace Decl. ¶ 15.

32. FNC begins its news day at 5:00 a.m. by offering an analysis of the previous day's top stories and continues to update and report the news throughout the day. Wallace Decl. ¶ 16.

33. FNC's current daytime programs include *Fox and Friends*, *America's Newsroom*, *Happening Now*, *Outnumbered*, *The Real Story with Gretchen Carlson*, *Your World with Neil Cavuto*, and *The Five*. Wallace Decl. ¶ 17.

34. *The Five* is a talk show featuring a rotating panel of hosts, including Andrea Tantaros, Bob Beckel, Dana Perino, Eric Bolling, Greg Gutfeld, Juan Williams and Kimberly Guilfoyle, and guests who discuss current political issues and pop culture. Wallace Decl. ¶ 17.

35. *Shepard Smith Reporting* airs on FNC daily at 3:00 P.M. and throughout the day when major news stories occur. Wallace Decl. ¶ 17.

36. Shepard Smith delivers fast-paced reporting on the day's top stories from FNC's specially designed "Fox News Deck" studio. Wallace Decl. ¶¶ 17, 43–44.

37. From the Fox News Deck, Shepard Smith is able to pull the latest updates to provide viewers with the most up-to-date reporting on the most important stories. Berg Decl. ¶ 11; Wallace Decl. ¶¶ 17, 42.

38. FNC produces prime-time programs that offer analysis of the day's news by top commentators, as well as continued news reporting and interviews to provide viewers a full and up-to-date understanding of the most important stories. Wallace Decl. ¶ 18.

39. FNC's prime-time programs include the following: *The O'Reilly Factor*, *Hannity*, *On the Record with Greta Van Susteren*, and *Special Report with Bret Baier*. Wallace Decl. ¶ 18.

40. *The O'Reilly Factor* is a news and talk show hosted by Bill O'Reilly. Wallace Decl. ¶ 18.

41. *The O'Reilly Factor* has been the highest rated cable news show for more than ten consecutive years. Wallace Decl. ¶ 18.

42. *The O'Reilly Factor* has won two BMI Cable Awards and has been nominated for the Television Critics Association Award for Outstanding Achievement in News and Information. Villar Decl. ¶ 11.

43. *Hannity* is hosted by Sean Hannity, who is considered one of the most prominent and influential conservative voices in the country. Wallace Decl. ¶ 18.

44. *Hannity* features a mix of news, commentary, interviews and branded segments, such as the "Great American Panel," which is made up of three nightly in-studio guests from across the political spectrum who discuss various issues. Wallace Decl. ¶ 18.

45. *On the Record with Greta Van Susteren* is a news and interview program hosted by Greta Van Susteren. Wallace Decl. ¶ 18.

46. Ms. Susteren has conducted numerous high-profile interviews on *On the Record with Greta Van Susteren*, including interviews of former Presidents George H. W. Bush, Bill Clinton and George W. Bush. Wallace Decl. ¶ 18.

47. *On the Record with Greta Van Susteren* has been the highest rated cable news program in its timeslot. Villar Decl. ¶ 10.

48. *Special Report with Bret Baier* is anchored by Washington news veteran Bret Baier and provides in-depth analysis of news and political issues. Wallace Decl. ¶ 18.

49. *Special Report with Bret Baier* has been the number one news program on cable in its time slot. Villar Decl. ¶ 10.

50. After its prime-time programming, FNC continues to report on major ongoing stories throughout the night and airs *Red Eye with Greg Gutfeld* at 3:00 a.m. Wallace Decl. ¶ 19.

51. On the weekends, FNC has a full schedule of news and information programming, including *Fox and Friends Weekend*, *America's News Headquarters*, *The Journal Editorial Report*, *Fox Report*, *Huckabee*, *Fox News Sunday with Chris Wallace*, and *Media Buzz*. Wallace Decl. ¶ 20.

52. Each episode of FNC's programs is separately written, produced, and directed by Fox News. Wallace Decl. ¶ 16.

53. FNC's programs are very valuable to Fox News. Carry Decl. ¶¶ 8, 14.

54. FNC's programs are watched weekly by millions of viewers. Villar Decl. ¶¶ 12–15; Wallace Decl. ¶ 15.

B. Fox Business Network

55. FBN is a financial news channel that provides real-time information and reports on financial and business news. Villar Decl. ¶ 16; Wallace Decl. ¶¶ 13, 21.

56. FBN has been in operation since October 2007. Villar Decl. ¶ 16; Wallace Decl. ¶ 13.

57. FBN's viewership has increased significantly over the past few years and is expected to continue growing. Villar Decl. ¶¶ 16–19; Wallace Decl. ¶ 21.

58. FBN is distributed to more than 70 million cable subscribers across the United States. Villar Decl. ¶ 16.

59. FBN creates and distributes original programming. Wallace Decl. ¶ 21.

60. FBN programming offers insights, interviews, and breaking news on business and financial stories. Villar Decl. ¶ 17; Wallace Decl. ¶ 21.

61. FBN's weekday programming includes the following programs: *Imus in the Morning*, *Opening Bell with Maria Bartiromo*, *Varney & Co.*, *Risk & Reward with Deirdre Bolton*, *MONEY with Melissa Francis*, *Countdown to the Closing Bell*, *After the Bell*, and *The Willis Report*. Wallace Decl. ¶ 22.

62. FBN's prime-time programming includes the following programs: *Making Money with Charles Payne*, *Lou Dobbs Tonight*, *Cavuto*, *The Independents*, and *Stossel*. Wallace Decl. ¶ 23.

63. When major stories develop overnight, FBN continues to provide the latest updates. Wallace Decl. ¶ 24.

C. Fox News' Significant Investment in News Gathering and Reporting

64. Fox News must make significant investments in order to produce up-to-the-minute news reports and to develop and to maintain its overall newsgathering business. Berg Decl. ¶¶ 3–4.

65. Fox News' annual newsgathering costs [REDACTED], which do not include other costs such as capital investments in studio and field equipment. Berg Decl. ¶ 8, Ex. 13.

66. TVEyes' CEO testified that he assumes that it is expensive for Fox News to create its news content. Simmons Decl. Ex. 66 (Ives Dep. (Mar. 20, 2014) 322:13–17 (“Q. Would you agree with me that it’s expensive for FOX News to create its news content? A. I don’t know what it costs, but I would assume that it’s expensive.”))

(i) News Bureaus and Equipment

67. Fox News [REDACTED] to open and maintain bureaus in twelve U.S. cities and several foreign locations. Berg Decl. ¶ 12.

68. Fox News [REDACTED]
[REDACTED] to acquire high-tech equipment necessary to collect, produce and telecast news. Berg Decl. ¶ 15.

69. Fox News has acquired satellite trucks and quick response vehicles, which include mobile transmission facilities that are custom built and specialized for Fox News’ particular needs. Berg Decl. ¶ 16.

70. Fox News has acquired professional cameras—both studio cameras and shoulder-mounted cameras for electronic newsgathering—and associated gear, such as tripods, recording media, batteries, and chargers. Berg Decl. ¶ 17.

71. Fox News has acquired production and wireless equipment, including editing equipment and control rooms. Berg Decl. ¶ 18.

72. Fox News has acquired lighting, both portable and fixed. Berg Decl. ¶ 18.

73. Fox News has acquired sophisticated computer information systems. Berg Decl. ¶ 18.

74. Fox News has acquired fixed transmission facilities. Berg Decl. ¶ 18.

75. Fox News [REDACTED] to create its high-tech Fox News Deck studio to serve as a centralized hub for breaking news. Berg Decl. ¶ 11.

76. The Fox News Deck is uniquely suited for breaking news as its reporters are situated on camera, rather than in a back office. Berg Decl. ¶ 11; Wallace Decl. ¶ 43.

77. The Fox News Deck enables producers and reporters to have instant access to developments that they can incorporate into the program and illustrate onscreen for viewers immediately, thereby speeding the dissemination of information to the audience. Berg Decl. ¶ 11; Wallace Decl. ¶ 42–43.

(ii) Journalists and Other Staff

78. Fox News [REDACTED] highly-skilled journalists and staff members. Berg Decl. ¶ 6.

79. Fox News makes significant investments of time and money to identify and hire these professionals, which include (1) on-air journalists; (2) newsgathering personnel, such as producers, camera operators, photographers, truck operators, and field technicians; (3) support personnel, such as editors, graphic artists, scenic artists, hair and makeup artists; (4) administrative personnel; and (5) specialized personnel, such as broadcast engineers. Berg Decl. ¶¶ 6–7.

80. The payroll costs associated with Fox News' newsgathering operations [REDACTED]
[REDACTED]. Berg Decl. ¶ 8.

81. Fox News has invested in developing its professionals' job-specific skills, which are required to enable them to gather and report information quickly and accurately and which take years to develop. Berg Decl. ¶ 6; Wallace Decl. ¶ 40–41.

82. Fox News' journalists develop contacts who will supply information in breaking news situations and with whom they have developed bonds of trust over many years of work.

Berg Decl. ¶ 6.

(iii) News Agencies

83. Fox News [REDACTED]

[REDACTED]. Berg Decl. ¶ 20.

84. The Associated Press and Reuters provide Fox News with raw, unvoiced video from all over the world to supplement Fox News' own newsgathering efforts. Berg Decl. ¶ 20.

85. Fox News is a member of Network News Service, LLC ("NNS"), which is a vehicle for ABC News, CBS News, and Fox News to pool resources and share video among them. Berg Decl. ¶ 21.

86. [REDACTED]

[REDACTED]. Berg Decl. ¶ 21.

(iv) Additional Costs of Reporting Major News Stories

87. When major unanticipated news occurs, Fox News sends journalists and staff to cover the story where it is unfolding. Berg Decl. ¶¶ 22–23; Wallace Decl. ¶ 34.

88. Fox News sent journalists and staff to Boston, Massachusetts in April 2013 to cover the Boston Marathon bombing and manhunt. Berg Decl. ¶ 26; Wallace Decl. ¶ 34.

89. Fox News sent journalists and staff to Moore, Oklahoma in May 2013 to cover the devastating tornado. Berg Decl. ¶ 25; Wallace Decl. ¶ 34.

90. [REDACTED]

[REDACTED]

[REDACTED]

Berg Decl. ¶¶ 22, 26–27.

91. The extra costs required to cover major unanticipated news stories include travel costs for personnel (*e.g.*, housing, overtime and per diems); shipping costs for broadcast equipment; additional personnel hired specifically to report a breaking news event; rental and purchase of special equipment (*e.g.*, quick response vehicles, professional cameras, wireless equipment); replacing equipment that is damaged or stolen; additional operating costs for satellite trucks and work space in remote locations; satellite, cellular, and Internet charges when working in remote locations; security costs for dangerous assignments; and medical care for injured staff and freelancers. Berg Decl. ¶ 28.

92. [REDACTED]

[REDACTED]

[REDACTED]

Berg Decl. ¶¶ 30–31.

D. Fox News' Digital Businesses

93. Fox News has invested heavily in building and growing its online and digital presence. Declaration of Jeff Misenti dated June 26, 2014 (“Misenti Decl.”) ¶¶ 4, 7.

94. With its online and digital presence, Fox News’ goal is to provide its audience with a richer news experience and to increase the overall viewership of Fox News’ content by making it accessible on platforms other than its cable channels. Misenti Decl. ¶¶ 3–4.

95. David Ives, TVEyes’ CEO, admitted in his deposition that he “go[es] to [the FoxNews.com website] every day,” because “[t]here is news there.” Simmons Decl. Ex. 66 (Ives Dep. (Mar. 20, 2014) 76:2–8).

96. While Fox News' digital unit leverages the labor, skills, and expenditures that already are necessary for Fox News' television channels, it adds its own specialized expertise and [REDACTED]. Misenti Decl. ¶¶ 6–7

97. Fox News makes live-streams of FNC and FBN available on the Internet through its TVEverywhere service. Misenti Decl. ¶ 9; Villar Decl. ¶ 29.

98. To access the TVEverywhere service, viewers must have a cable or satellite subscription and obtain credentials from their cable or satellite providers. Misenti Decl. ¶ 9; Villar Decl. ¶ 29.

99. Viewers who have access can use TVEverywhere's service to watch FNC or FBN on Fox News' websites and on their mobile devices. Misenti Decl. ¶ 9; Villar Decl. ¶ 29.

100. When viewers watch live-streams of FNC or FBN on TVEverywhere, they see advertising and will soon be counted in the ratings. Villar Decl. ¶ 29.

101. Fox News makes video clips of content originally telecast on its channels available to the public on its websites, FoxNews.com and FoxBusiness.com. Misenti Decl. ¶¶ 12, 15.

102. As Fox News' coverage unfolds on its channels, Fox News' team of video editors edit its content specifically for digital and online distribution. Misenti Decl. ¶ 12.

103. Fox News' clips generally are available on Fox News' websites within an hour of airing. Misenti Decl. ¶ 12.

104. Fox News continuously updates its website with new clips. Misenti Decl. ¶¶ 12–

105. The availability of Fox News' video clips encourages viewers to visit Fox News' websites, both to see the clips as well as to see other online-only content. Misenti Decl. ¶¶ 12–13.

106. Fox News permits video clips of its content to be distributed through third-party websites, including Yahoo!, Hulu, and YouTube. Misenti Decl. ¶ 20.

107. People can disseminate Fox News' clips by posting links to the clips on other websites and social media platforms (such as Facebook, Twitter, and LinkedIn), and when users click on the links, they will be taken back to Fox News' websites to watch the clips. Misenti Decl. ¶ 16.

108. Fox News' video clips can be displayed using Fox News' proprietary video player on any third-party website using website "embed codes" supplied by Fox News. Misenti Decl. ¶ 16.

109. While they are on Fox News' websites or using Fox News' video player, users are exposed to ads and other promotional content and are counted among Fox News' websites' visitors. Misenti Decl. ¶ 19.

110. Fox News helps users find video clips by providing a robust search engine on its websites, which uses computer-created transcripts of Fox News' video clips to allow users to search for any keywords referenced in the video clips. Misenti Decl. ¶ 18.

111. Fox News allows its video clips to be listed on Internet search engines, such as Google.com. Misenti Decl. ¶ 18.

E. Fox News' Exclusive Licensing Agent for Video Clips

112. Fox News distributes video clips of its content through its exclusive clip licensing agent, ITN Source, Ltd. ("ITN Source"). Misenti Decl. ¶ 21; Declaration of Andrew Williams dated June 26, 2014 ("Williams Decl.") ¶¶ 8–9.

113. ITN Source has a dedicated staff whose job is to distribute and license video clips of Fox News' content to companies and governmental organizations for use in a variety of ways, including to post on an Intranet site or social media platform or to create a digital archive. Williams Decl. ¶¶ 11–12, 22.

114. ITN Source maintains a library of over 80,000 Fox News video clips, which its customers can search using keywords. Williams Decl. ¶ 21.

115. If a video clip is not included in its library, ITN Source can work with Fox News to license it. Williams Decl. ¶¶ 23–24.

116. ITN Source's partner, Executive Interviews Ltd. ("Executive Interviews"), distributes Fox News' content by marketing copies of video clips to guests who have appeared on Fox News' channels. Declaration of Liz Ashton dated June 26, 2014 ("Ashton Decl.") ¶¶ 3, 9; Misenti Decl. ¶ 23; Williams Decl. ¶ 10.

117. Executive Interviews has a large client base of that includes multinational corporations, small boutique and regional companies, nonprofit organizations, and government entities. Ashton Decl. ¶¶ 8–9.

118. Executive Interviews leverages its client base on behalf of Fox News when it markets the availability of fully licensed video clips that can be used by its clients in a number of different ways, including posting on social media platforms. Ashton Decl. ¶ 9; Misenti Decl. ¶ 23.

F. Fox News' Monetization of its Video Content and News Reports

(i) Payments from Cable, Satellite and other Multichannel Video Programming Distributors ("Affiliates" or "MVPDs") and Advertising Fees

119. Fox News' channels are not over-the-air broadcast television networks that are available to viewers for free. Carry Decl. ¶¶ 3–4.

120. Fox News' channels are only available on cable, satellite, or other multichannel video programming platforms. Carry Decl. ¶ 4.

121. Fox News has invested tremendous skill, labor and effort to construct its relationships with cable, satellite and other multichannel video programming providers (collectively "affiliates") carefully and to negotiate the terms of their agreements. Carry Decl. ¶¶ 8–13.

122. [REDACTED]

Carry Decl. ¶ 10.

123. [REDACTED]

[REDACTED]

Carry Decl. ¶ 11.

124. [REDACTED]

[REDACTED]

Carry Decl. ¶ 12.

125. Fox News' affiliates' subscriber contracts have specific terms that prohibit, among other things, "redistributing or retransmitting the Service." Carry Decl. ¶ 13.

126. In exchange for the right to include FNC and FBN in their subscription packages,

affiliates pay per-subscriber carriage fees. Carry Decl. ¶¶ 6–8.

127. Companies pay Fox News to telecast advertisements during commercial breaks on FNC and FBN. Carry Decl. ¶ 7.

128. Advertising fees are determined, in part, based on the viewership of Fox News' channels. Carry Decl. ¶ 7.

(ii) Revenues from Online Advertising

129. Companies pay Fox News to have their pre-roll commercials displayed before a viewer is able to watch a video clip of Fox News content. Misenti Decl. ¶ 19.

130. Companies pay Fox News to place banner advertisements on Fox News' websites, which are displayed to viewers who visit them. Misenti Decl. ¶ 19.

131. The higher the Fox News websites' viewership and the longer viewers stay on the websites, the more advertising revenue Fox News will earn. Misenti Decl. ¶ 19.

132. Over the past three years, Fox News' online advertising revenues from FoxNews.com [REDACTED]. Misenti Decl. ¶ 19.

133. [REDACTED]. Misenti Decl. ¶ 5, 19.

(iii) Income from Video Clip Licensing

134. [REDACTED]

[REDACTED] Misenti Decl. ¶ 20.

135. [REDACTED]

[REDACTED] Misenti Decl. ¶ 24.

G. Fox News' Copyrights in Its Programs

136. Fox News owns the copyrights to all of its programs that are aired on FNC and FBN. Wallace Decl. ¶ 26.

137. Fox News owns the United States copyright registration to the following audiovisual or “motion picture” works: (1) *On the Record with Greta Van Susteren*, Episode of Wednesday 10/31/2012 10:00 PM (U.S. Copyright Registration No. PA 1-818-109); (2) *Special Report with Bret Baier*, Episode of Monday 10/29/2012 6:00 PM (U.S. Copyright Registration No. PA 1-818-110); (3) *The Five*, Episode of Friday 11/02/2012 5:00 PM (U.S. Copyright Registration No. PA 1-818-111); (4) *The O’Reilly Factor*, Episode of Tuesday 10/16/2012 8:00 PM (U.S. Copyright Registration No. PA 1-818-112); (5) *The O’Reilly Factor*, Episode of Wednesday 10/31/2012 8:00 PM (U.S. Copyright Registration No. PA 1-818-113); (6) *Special Report Investigates: Death & Deceit in Benghazi*, Episode of Friday 10/19/2012 10:00 PM (U.S. Copyright Registration No. PA 1-818-114); (7) *The Fox Report with Shepard Smith*, Episode of Friday 11/02/2012 7:00 PM (U.S. Copyright Registration No. PA 1-818-118); (8) *Hannity*, Episode of Monday 10/22/2012 11:05 PM (U.S. Copyright Registration No. PA 1-818-120); (9) *Hannity*, Episode of Wednesday 10/31/2012 9:00 PM (U.S. Copyright Registration No. PA 1-818-122); (10) *The O’Reilly Factor*, Episode of Wednesday 07/03/2013 8:00 PM (U.S. Copyright Registration No. PAu 3-679-883); (11) *The O’Reilly Factor*, Episode of Tuesday 07/02/2013 8:00 PM (U.S. Copyright Registration No. PAu 3-679-885); (12) *Hannity*, Episode of Wednesday 07/03/2013 9:00 PM (U.S. Copyright Registration No. PAu 3-679-887); (13) *Hannity*, Episode of Friday 06/28/2013 9:00 PM (U.S. Copyright Registration No. PAu 3-679-888); (14) *The Fox Report with Shepard Smith*, Episode of Wednesday 07/03/2013 7:00 PM (U.S. Copyright Registration No. PAu 3-679-890); (15) *On the Record with Greta Van Susteren*, Episode of Wednesday 06/26/2013 10:00 PM (U.S. Copyright Registration No. PAu 3-679-891); (16) *The Five*, Episode of Friday 06/28/2013 5:00 PM (U.S. Copyright Registration No. PAu 3-679-895); (17) *The Five*, Episode of Tuesday 07/02/2013 5:00 PM (U.S. Copyright Registration

No. PAu 3-679-898); (18) *Special Report with Bret Baier*, Episode of Tuesday 07/02/2013 6:00 PM (U.S. Copyright Registration No. PAu 3-679-900); and (19) *Special Report with Bret Baier*, Episode of Friday 06/28/2013 6:00 PM (U.S. Copyright Registration No. PAu 3-679-902) (collectively the “Registered Works”). Wallace Decl. ¶¶ 27–28, Ex. 56; Simmons Decl. Ex. 69 (RFA Resp. Nos. 1–19).

138. All of the United States copyright registrations for the Registered Works were obtained less than five years after the publication date of the Registered Works. Wallace Decl. ¶ 28, Ex.56.

139. The Registered Works include many creative and expressive choices, including selecting the stories to cover, how to write and arrange them, and which points to emphasize or discuss. Wallace Decl. ¶ 27.

140. The Registered Works contain the commentary and analysis of Fox News’ professional staff. Wallace Decl. ¶¶ 27, 35.

141. The Registered Works include numerous artistic elements, including textual and pictorial graphics, music and sound effects, set dressing, and audiovisual content. Wallace Decl. ¶¶ 27, 33.

142. The Registered Works embody the choices of various camera operators, who decide which lens to use, the depth of field, and the positioning of different elements in frame. Wallace Decl. ¶ 33.

II. TVEyes Inc.

143. TVEyes owns and operates a subscription-based service, which is available at TVEyes.com. TVEyes’ Answer dated October 15, 2013 (Dkt. No. 12) (“Def. Ans.”) ¶ 8; Simmons Decl. Exs. 70 (RFA Resp. No. 87), 86 at TVEYES-009606.

144. TVEyes' website states that it delivers "real-time TV and radio content on an international platform for a flat fee." Simmons Decl. Ex. 72 at FOXNEWS0000043.

145. Subscriptions to TVEyes generally cost \$500 a month. Simmons Decl. Ex. 64 (Hayter Dep. (Mar. 11, 2014) 42:5–9 ("Q. . . . Users pay to access the TVEyes media monitoring suite, right? A. Yes. Q. It's generally \$500 a month? A. As far as I know, yes.")).

146. TVEyes records content in the United States from 210 Designated Market Areas and more than 1,600 stations including all major network affiliates and network cable television stations. Def. Ans. ¶ 31.

147. TVEyes' CEO, David Ives, testified that recording television content "24/7" is "an important part of our service." Simmons Decl. Ex. 66 (Ives Dep. (Mar. 20, 2014) 41:2–3).

A. TVEyes Copies Fox News' Content

148. Content from the FNC and FBN channels is available on TVEyes. Def. Ans. ¶¶ 31, 45; Simmons Decl. Ex. 66 (Ives Dep. (Mar. 20, 2014) 40:16–19 ("Q. And is the Fox News Channel and the Fox Business Network, are those two of the channels that TVEyes records? A. Yes.")).

149. TVEyes copies all of Fox News' content on FNC and FBN, as well as content from other channels, and stores it on TVEyes' servers. Def. Ans. ¶¶ 1, 30, 31, 33, 37; Simmons Decl. Ex. 64 (Hayter Dep. (Mar. 11, 2014) 63:6–9 ("Q. You would agree that the TVEyes service allows subscribers to see recorded television programs? A. Correct.")), *id.* (64:15–65:19 ("Q. With regard to TVEyes, the third bullet reads that 'TVEyes: Provides real-time internet access to complete transcripts from video clips.' Right? A. Correct. Q. The video clips are of telecasts? A. Telecasts? Q. The video clips are of television programs? A. They can be whatever has been aired. Q. On television? A. On television. Q. So the video clips are of whatever is aired

on television? A. Yes. Q. Let me make sure we don't have a blip in the transcript. So the video clips are of whatever is aired on television? A. Yes. Q. And the TVEyes service provides video clips of the Fox News Channel? A. Correct. Q. It also provides video clips of the Fox Business Network? A. Correct. Q. TVEyes makes those video clips available after they appear on television? A. Correct.”)).

150. TVEyes has copied video clips from Fox News' websites for TVEyes' subscribers. Simmons Decl. Exs. 70 (RFA Resp. Nos. 165, 167), 107 at TVEYES-037151 (TVEyes' VP of Sales, Michael Schmitt, stated that TVEyes “can save a digital file” from “video[s] on the Fox News website” on behalf of TVEyes' users).

151. TVEyes admits that it has copied all of the Registered Works verbatim and in their entirety. Simmons Decl. Exs. 66 (Ives Dep. (Mar. 20, 2014) 39:24–40:25 (“Q. . . . Does TVEyes obtain feeds of television stations and channels? A. Yes. . . . Q. And is the FOX News Channel and the FOX Business Network, are those two of the channels that TVEyes records? A. Yes. Q. Does TVEyes attempt to copy all the television programs that it obtains 24 hours a day, seven days a week, 365 days a year? A. We usually record 24/7.”), 64 (Hayter Dep. (Mar. 11, 2014) 87:23–88:12 (“Q. . . . TVEyes' service records everything that is telecast, right? A. On certain channels, correct. Q. Does it record everything telecast on FOX News Channel? A. I think so, yes. Q. Does it record everything that is telecast on FOX Business Network? A. Yes, as far as I know. Q. Does the system add content to a television program's video? A. No, we don't change the content.”)), 69 (RFA Resp. Nos. 20–38).

B. How TVEyes Acquires Fox News' Content

152. TVEyes “captures” FNC through a cable signal and a CableCard provided by Comcast and through a cable service and a cable received provided by Cablevision. Simmons

Decl. Ex. 121 (Declaration of David Seltzer, TVEyes Systems Architect, dated Feb. 20, 2014 (“Seltzer Decl.”), Ex. A at 4).

153. TVEyes “captures” FBN through cable service and a cable receiver provided by ImOn. *Id.*

154. Clause 8.5 of Comcast’s Business Services terms and conditions prohibits “copying, redistribution, reselling, bundling or publication.” Simmons Decl. Ex. 122.

155. Clause 8 of Cablevision’s Agreement for Optimum TV for Business states that subscribers “may not make copies of programs” and “may only display programming at [their] service location,” and Clause 23 forbids subscribers from “redistributing or retransmitting the Service, or any portion thereof, or transmitting or distributing the Service, or any portion thereof, to persons outside the service location on your account.” Simmons Decl. Ex. 123.

156. Clause 5 of ImOn’s Business Terms of Service states: “Customer shall not . . . (i) copy, record, dub, duplicate, alter, make or manufacture any recordings or other reproductions” or “(ii) transmit the Services (or any part thereof) by any television or radio broadcast or by any other means or use the Services (or any part thereof) outside the Service Location.” Simmons Decl. Ex. 124.

157. In discovery, Fox News repeatedly asked TVEyes to produce copies of its agreements with the cable providers Cablevision, Comcast and ImOn. Simmons Decl. ¶ 61.

158. TVEyes refused to produce its agreement with Cablevision, Comcast and ImOn. Simmons Decl. ¶ 61.

159. TVEyes has never denied to Fox News that its agreements with these cable providers include these same prohibitions—even when Fox News’ counsel discussed this issue with the Court at a hearing on April 7, 2014. Simmons Decl. ¶ 62.

160. The Terms of Use of Fox News' websites, FoxNews.com and FoxBusiness.com, state that users "may not copy, download, stream capture, reproduce, duplicate, archive, upload, modify, translate, publish, broadcast, transmit, retransmit, distribute, perform, display, sell or otherwise use" Fox News' content. Simmons Decl. Exs. 73, 74.

C. TVEyes Describes Itself as a "Clipping Service"

161. On March 5, 2012, Michael Schmitt, TVEyes' Vice President of Sales, stated in an email to a potential customer: "TVEyes is a great clipping service." Simmons Decl. Ex. 115 at TVEYES-037132.

162. A TVEyes document authored by Sr. VP of Global Sales, Larry Gallo, states that TVEyes "delivers 24/7/365 in real time a television news clipping service" and also includes a "[d]escription of [TVEyes'] TV News clipping service." Simmons Decl. Ex. 86 at TVEYES-009606.

163. In e-mails, TVEyes' executives have described TVEyes to potential customers as "a software-as-a-service for broadcast monitoring and clipping." Simmons Decl. Exs. 108 at TVEYES-001997, 109 at TVEYES-038936, 110 at TVEYES-038909.

164. In e-mails, TVEyes' executives have stated: "We do not charge per clip like a traditional clipping service." Simmons Decl. Exs. 108 at TVEYES-001997, 109 at TVEYES-038937, 110 at TVEYES-038909.

165. TVEyes markets itself as "more effective and far less expensive than using old-fashioned press clipping services." Simmons Decl. Ex. 111 at TVEYES-008271.

166. [REDACTED]

[REDACTED] Declaration of Caley Cronin dated June 26, 2014 ("Cronin Decl.") ¶ 3.

167. [REDACTED]

[REDACTED]

Cronin Decl. ¶ 4; *see also* Simmons Decl. Ex. 68 (Cronin Dep. (Apr. 1, 2014) 17:11–14 [REDACTED])

[REDACTED] *id.*

(96:9–16 [REDACTED])

[REDACTED]

[REDACTED]

[REDACTED]

D. TVEyes' Service

(i) Watch Live Television and Breaking News

168. TVEyes' Fact Sheet states that subscribers can use its service "watch live TV, 24/7, on any station [it is] recording." Simmons Decl. Exs. 88, 64 (Hayter Dep. (Mar. 11, 2014) 303:11–19 ("Q. . . . I'm just asking, you, in terms of the TVEyes system and using your definition of 'near realtime,' isn't it true that Media Snapshot allows users to watch near realtime streams of everything available to them? . . . A. Yes.")); *see also id.* 87 at TVEYES-044104 (marketing that subscribers can watch "digital video segments in real-time")

169. TVEyes states in its marketing materials that subscribers can use its service to "monitor[] Breaking News." Simmons Decl. Ex. 83 at TVEYES-010934.

170. TVEyes enables its subscribers to watch live streams of television channels, including FNC and FBN. Simmons Decl. Ex. 66 (Ives Dep. (Mar. 20, 2014) 117:15–118:13 ("Q. . . . [R]eal time is something that TVEyes frequently uses in its marketing material to potential subscribers, correct? A. Yes. Q. And when TVEyes is using that term in its marketing material to potential subscribers, it's communicating to them that its material is available essentially

instantly, correct? A. Real time is a relative term, and almost every subscriber has had a free trial prior to subscribing, and they would see that real time is not instantaneous. Q. You use the phrase ‘real time,’ correct? A. That's right. Q. You don't say almost real time, do you? A. No -- in some cases we do. Q. Isn't it true that TVEyes specifically touts its service as making things available in real time? A. Yes.”)), Ex. 89.

171. [REDACTED]

[REDACTED] Cronin Decl. ¶ 7.

172. TVEyes does not require its subscribers to have a separate cable or satellite subscription. Simmons Decl. Ex. 66 (Ives Dep. (Mar. 20, 2014) 97:16–98:4 (“Q. So TVEyes does not require its subscribers to first have an agreement with a cable company to access Fox News and Fox Business content, right? A. Could you repeat that, please. MS. CENDALI: Can you read it back. (A portion of the record was read.) A. That’s right. Q. So a TVEyes subscriber, through TVEyes, could get access to Fox News and Fox Business content without having to pay a fee to a cable company, right? A. That’s possible.”)).

(ii) View Past Television Programs

173. TVEyes has described its service as “having functionality similar to a DVR” and that it “works like a TiVo!” Simmons Decl. Exs. 70 (RFA Resp. Nos. 101, 131, 133), 83 at TVEYES-010930, 112 at TVEYES-036863, 113 at TVEYES-039495, 114 at TVEYES-039608.

174. TVEyes’ marketing materials state that subscribers can “play unlimited clips” of the content it has recorded. Simmons Decl. Exs. 108 at TVEYES-001996, 109 at TVEYES-038936, 110 at TVEYES-038909.

175. TVEyes’ subscribers can play clips of content it has recorded in 10-minute segments, which can be viewed sequentially in order to watch an entire program. Simmons

Decl. Ex. 66 (Ives Dep. (Mar. 20, 2014) 45:23–46:16 (“Q. You don’t do anything to limit how much content a TVEyes subscriber views, correct? A. When a user searches a term and views the snippet of video, I believe we have an outside limit of ten minutes. Q. Isn’t it true that a TVEyes subscriber can view as many ten-minute segments as it wants? . . . A. We don’t limit the number of video plays per search, no. Q. And isn’t it true that TVEyes doesn’t limit a subscriber’s ability to watch as many consecutive ten-minute segments as they wish? A. I don’t believe there’s a limit there.”)).

176. Subscribers can pause, rewind and fast-forward the video content TVEyes has recorded using TVEyes’ service. Simmons Decl. Ex. 64 (Hayter Dep. (Mar. 11, 2014) 254:14–21 (“Q. A user can fast forward? A. . . . They can fast forward. Q. They can rewind? A. Yes, correct. Q. And they can pause? A. Yes.”)).

(iii) Download Unlimited High-Definition Video Clips and Share Them with Others

177. TVEyes markets itself as enabling its subscribers to “download unlimited digital clips” of video content for a flat fee. Simmons Decl. Ex. 111 at TVEYES-008270; *see also id.* Ex. 87 at TVEYES-044104 (“**download an unlimited number of digital clips**” (emphasis in original))

178. TVEyes’ CEO, David Ives, testified that “[d]ownloading clips is an important feature” of TVEyes’ service. Simmons Decl. Ex. 66 (Ives Dep. (Mar. 20, 2014) 58:3–8).

179. TVEyes’ marketing materials reference the availability of “unlimited clips in real time.” Simmons Decl. Exs. 89, 116 at TVEYES-037687.

180. TVEyes does not blacklist any material that it records to prevent it from being viewed or downloaded. Simmons Decl. Exs. 64 (Hayter Dep. (Mar. 11, 2014) 319:9–17 (“Q. Power Search doesn’t withhold any search results, right? A. Not that I know, no. Unless the user

is not set up for a channel, then they won't get those results. Q. But it doesn't withhold any search results of channels available to that user? A. Correct. Q. It doesn't blacklist any material? A. Not that I know.")), 66 (Ives Dep. (Mar. 20, 2014) 52:6–8 ("Q: Is any of the FOX News content black listed? A. No.")).

181. TVEyes' promotes the availability of high-definition clips on its service. Simmons Decl. Exs. 86 at TVEYES-009607, 70 (RFA Resp. Nos. 303, 305), 64 (Hayter Dep. (Mar. 11, 2014) 111:23–112:25 ("Q. And you designed the system to allow this downloading of the high definition files? A. Of clips, yeah. Q. And users do download them? A. As far as I know, yes. Q. Well, you know that users download clips from your service, right? A. Yes, yes, yes. Q. And those high definition clips could be lower quality? A. They could be. Q. And those high definition clips could also be in black and white, couldn't they? A. They could, yes. Q. And they would still be watchable? A. It depends on what the user wants it for. Q. But in terms of seeing what was on television, they would still see what was on television, right? A. That makes sense, yeah.")).

182. Video clips downloaded from TVEyes' service can be as long as ten minutes. Simmons Decl. Exs. 70 (RFA Resp. No. 285), 64 (Hayter Dep. (Mar. 11, 2014) 294:25–295:4 ("Q. Videos using any of the clip editor's functions can be as long as 10 minutes, right? A. Yes.")).

183. TVEyes allows its subscribers to download unlimited numbers of ten-minute clips seriatim, thereby permitting entire television programs to be downloaded. Simmons Decl. Exs. 70 (RFA Resp. Nos. 277, 293), 64 (Hayter Dep. (Mar. 11, 2014) 295:5–15 ("Q. Nothing would stop a user from putting in six 10-minute clips in a row, right? A. Not that I'm aware of. Q. In other words, a user could download an hour of programming in six files, right? A. They could.

It's not what our system is made for. Q. But they could do that? A. It's possible.'')), 87 at TVEYES-044104.

184. TVEyes' CEO testified that subscribers are able to download an entire news story on TVEyes' service. Simmons Decl. Ex. 66 (Ives Dep. (Mar. 20, 2014) 54:17–20 ("Q. So TVEyes can permit a user to download an entire news story, right? A. That is -- that is absolutely a capability.''))).

185. [REDACTED]

[REDACTED]

[REDACTED] Cronin Decl.

¶¶ 3, 4.

186. TVEyes does not put a copyright notice on the downloaded video clips of Fox News' content to indicate that they came from Fox News. Simmons Decl. Ex. 66 (Ives Dep. (Mar. 20, 2014) 61:4–7 ("Q. And when subscribers download videos there is no copyright notice on any of the videos, right? A. I don't believe so.''))).

187. TVEyes does not put a watermark on the downloaded video clips of Fox News' content. Simmons Decl. Exs. 66 (Ives Dep. (Mar. 20, 2014) 58:25–59:22 ("Q. So does TVEyes embed a watermark on any of the videos it makes available to its subscribers? A. In some cases. . . Q. Why are you not watermarking Fox News content? A. We don't watermark the vast majority of our content. Q. Why? A. We have no reason to.'')), 64 (Hayter Dep. (Mar. 11, 2014) 264:2–4 ("Q. There is no watermark on the video clip? A. No, not that I know of.''))).

188. TVEyes places no technological restrictions on what its subscribers can do with video clips once they are downloaded. Simmons Decl. Exs. 66 (Ives Dep. (Mar. 20, 2014) 54:25–55:16 ("Q. And once a subscriber downloads a video, the subscriber can do whatever they

want with it, right? A. Theoretically. Q. So a subscriber could forward the video to other people; right? A. Yes. Q. A subscriber could upload the video to YouTube, right? A. Yes. Q. A subscriber could tweet the video or post it on FOX Business, right? A. Yes. Q. A subscriber can put the video in a PowerPoint presentation, correct? A. Yes.”)), 64 (Hayter Dep. (Mar. 11, 2014) 262:18–263:5 (“Q. When someone downloads a media file from this website, they're given a file? A. Yes. Q. Does TVEyes monitor users' use of clips, once they are downloaded? A. I think we logged that it was downloaded. Q. But do you monitor these after it was downloaded? A. If they have the entire clip themselves, snippet, then no, I don't think so. But I don't know.”)).

189. TVEyes’ website states that its subscribers can use its service to “[e]mail unlimited clips to unlimited recipients” and “[p]ost an unlimited number of clips” to social media. Simmons Decl. Ex. 72, at FOXNEWS0000043; *see also id.* Ex. 87 at TVEYES-044104 (marketing ability to “share” video clips “with unlimited recipients”).

190. TVEyes’ CEO testified that TVEyes’ subscribers can “forward the video to other people,” “upload the video to YouTube,” “tweet the video,” or “put the video in a PowerPoint presentation.” Simmons Decl. Ex. 66 (Ives Dep. (Mar. 20, 2014) 55:5–16).

(iv) Create Archives of High-Definition Video Clips

191. According to its Fact Sheet, TVEyes provides its subscribers with “unlimited storage [of clips] on TVEyes servers.” Simmons Decl. Ex. 89.

192. Clips stored on TVEyes’ servers are permanently stored and never deleted, even if a subscriber terminates his or her account. Simmons Decl. Ex. 64 (Hayter Dep. (Mar. 11, 2014) 293:21–294:14 (“Q. Clips on the S3 server are never deleted, right? A. Correct, as far as I know. Q. Even if the user stops using the TVEyes service? A. Yes, but they have to have an account with us to get on the S3. Q. But once they have an account with you, their clips are never

deleted? A. Correct. Q. Even if they then leave the service? A. Correct. But they no longer have access, as far as I know. But if they resign up with us, then they can re-access -- that's why we don't delete them, so they can re-access their clips, like in case they forgot to purchase.”)), 83 at TVEYES-010929.

193. The TVEyes User Manual tells TVEyes’ subscribers to “[a]lways save” their clips in this manner, because “[t]his will ensure your clip is saved FOREVER!!” Simmons Decl. Ex. 83 at TVEYES-010929 (emphasis in original).

194. TVEyes’ Fact Sheet states that subscribers can “save hard copies to [their] own server” and “burn it onto a disc.” Simmons Decl. Ex. 89.

195. [REDACTED]

[REDACTED] Cronin Decl. ¶ 6.

196. [REDACTED]

[REDACTED] Cronin Decl. ¶ 6.

197. [REDACTED]

[REDACTED] Cronin Decl. ¶ 5.

(v) Share Hyperlinks to High-Definition Video Clips

198. TVEyes enables its subscribers to share hyperlinks to high-definition video clips with any person and to post these hyperlinks on social media platforms. Misenti Decl. ¶ 29, Ex. 63; Simmons Decl. Exs. 70 (RFA Resp. Nos. 137, 139, 141, 303, 305), 117 at TVEYES-037780.

199. When a viewer clicks on such hyperlinks, they are directed to TVEyes’ website (not the content owners’ website) to watch the video content. Simmons Decl. Ex. 82 at 20, 64 (Hayter Dep. (Mar. 11, 2014) 289:21–290:15 (“Q. And this goes on to say, ‘All the clips that you save using the clip editor will be stored here permanently.’ Is that right? . . . A. I think so. I think

it's in the Amazon S3 cloud or something. Q. And what is the Amazon S3 cloud? A. It's online storage, off-site storage. Q. With amazon.com? A. Yes. . . . 13 Q. Who set up the relationship with Amazon S3 service? A. I think it was David Seltzer.”)), *id.* (292:23–293:5 (“Q. And users can be given a direct playback URL, right? A. Yes, correct. Q. And that is a link that resolves to the Amazon S3 service? A. I would think so. I think that's how it works.”)).

(vi) Edit Video Clips

200. TVEyes’ marketing materials state that one of the “most useful features” of TVEyes for subscribers is a tool to “edit unlimited TV and Radio clips.” Simmons Decl. Ex. 86 at TVEYES-009607.

201. Once a clip is edited, TVEyes’ editing tool allows its subscribers to save or download the clip. Simmons Decl. Ex. 83 at TVEYES-010924, -010928, 64 (Hayter Dep. (Mar. 11, 2014) 276:14–277:3 (“Q. Please turn the page. This page describes different things that can be done with the edited clip, right? A. It looks that way, yes. Q. A user can click the "try it" link to preview their edited clip? A. Correct. Q. A user can click the "save it" link to save a clip for 30 days? A. Correct. Q. This allows a user to download a clip, right? A. Yes.”)).

202. According to TVEyes’ User Manual, subscribers can create a hyperlink to the edited clip that “becomes available immediately!” to post online or send to anyone for promotional purposes. Simmons Decl. Ex. 83 at TVEYES-010929.

(vii) Supplies Content to Other Media Clipping Services

203. TVEyes gives direct access to its database of copied content to “Sales Partners,” which include Moreover Technologies Inc., Burelle’s Information Services, LLC, Vocus, Inc., eOutreach, and Meltwater News US Inc. Simmons Decl. Exs. 99, 98, 100, 97, 101, 66 (Ives Dep. (Mar. 20, 2014) 227:9–14 (“Q. And then it says, ‘Sales Partners.’ What would be

encompassed in that? A. Those would be partners. Q. What type of partners? A. Partners where we provide data feeds.”)), *id.* (228:8–11 (“Q. And in the Sales Partners, can you tell me the names of some of the partners that you’re referring to? A. Vocus, Moreover, Meltwater.”)).

204. TVEyes’ agreements with eOutreach and Moreover Technologies state that this direct access to TVEyes’ database provides “a full feed of broadcast monitoring content” so that a Sales Partner can “include 24x7 coverage of the major US . . . news channels” on its own service. Simmons Decl. Exs. 97 at TVEYES-000289, 99 at TVEYES-003346.

205. TVEyes’ agreement with Burrelle’s Information Services, LLC states that this direct access to TVEyes’ database provides “comprehensive broadcast coverage of US channels” on its own service, and that it allows users to “search by date/time/station without closed caption keyword,” and download and share video clips. Simmons Decl. Ex. 98 at TVEYES-000286.

206. TVEyes’ agreement with Vocus, Inc. states that this direct access to TVEyes’ database “contain[s] all news programming from National Cables” on its own service, permits “Unlimited Streaming,” and allows Vocus subscribers to “Download Broadcast or Internet Quality Clips.” Simmons Decl. Ex. 100 at TVEYES-000331.

207. TVEyes’ agreement with Meltwater News US1, Inc. states that TVEyes will provide access “such that Meltwater customers can view and edit clips.” Simmons Decl. Ex. 101 at TVEYES-044431.

208. TVEyes’ “Sales Partners” make money by distributing the content from TVEyes’ database to their own customers. Simmons Decl. Ex. 66 (Ives Dep. (Mar. 20, 2014) 227:9–21 (“Q. And then it says, ‘Sales Partners.’ What would be encompassed in that? A. Those would be partners. Q. What type of partners? A. Partners where we provide data feeds. Q. You would

provide the data feed, and you would in return get some profit sharing? A. In some cases it's profit sharing. Q. What would it be in other cases? A. Licensing, licensing of our software.")).

209. TVEyes' "Sales Partners" facilitate even more viewers watching FNC and FBN without getting a cable or satellite subscription or visiting Fox News' website. Simmons Decl. Ex. 64 (Hayter Dep. (Mar. 11, 2014) 345:7–12("Q. TVEyes offers partners access to its APIs, right? A. Correct. Q. And API is an application program and interface? A. Correct.")), id. (346:21–24 ("Q. So TVEyes' APIs allow it -- TVEyes' APIs allow its partners to directly access the TVEyes database? A. Correct.")).

E. Fox News' Channels Are Commercially Important to TVEyes' Business

210. TVEyes' CEO, David Ives, testified that "24-hour news channels are particularly important" to TVEyes and that "TVEyes prioritizes the content that's most important to its customers, such as the 24-hour cable channels, including Fox News and Fox Business." Simmons Decl. Exs. 66 (Ives Dep. (Mar. 20, 2014) 63:9–13, 100:11–16).

211. In a November 10, 2008 email, TVEyes' Chief Technology Officer, James Hayter wrote that he "just spoke to Larry [Gallo, TVEyes' Senior Vice President for Global Sales] and Mike [Schmitt, TVEyes' Vice President of Sales]" and that "their top four high priority stations" included both FBN and FNC. Simmons Decl. Ex. 75.

212. In a July 12, 2012 email, TVEyes' CEO, David Ives, stated that FNC is "'must have' TV content." Simmons Decl. Ex. 84.

213. TVEyes admits that it has referenced FNC and FBN in its promotional materials for the TVEyes service. Simmons Decl. Ex. 70 (RFA Resp. Nos. 115, 117).

214. TVEyes' marketing materials state that FNC and FBN content are available on the service, including stating that it "has High Quality Resolution video for ALL cable news 24/7 in

real time, such as . . . FNC.” Simmons Decl. Ex. 86 at TVEYES-009610; *see also* 108 at TVEYES-001993.

215. TVEyes’ marketing emails have offered sample clips of Fox News’ content to potential subscribers. Simmons Decl. Exs. 109 at TVEYES-038936, -038939, 110 at TVEYES-038936, 117 at TVEYES-037780, 116 at TVEYES-037688, 87 at TVEYES-044104.

216. On a June 29, 2011, a TVEyes employee sent an email to Larry Gallo, TVEyes’ Senior Vice President of Global Sales, stating that TVEyes was “relatively close” to having “a secondary site set up to record Fox News and a couple other major cable networks” to guard against any content outages. Simmons Decl. Ex. 77; *see also id.* Ex. 81 (describing “really pissed off” clients when an outage caused a temporary loss of FNC content).

217. On June 29, 2011, a TVEyes employee sent an email to TVEyes’ CEO, David Ives, Mr. Ives, stating that TVEyes was “very close” to having “a backup system” established to record a second copy of Fox News and “eliminate . . . outages.” Simmons Decl. Ex. 78 at TVEYES-003116.

218. On June 29, 2011, a TVEyes employee sent an email to TVEyes’ CEO, David Ives, Mr. Ives, stating that TVEyes would have an “automated alerter to send a text message . . . if any of those top 24 hour news channels”—including FNC—“has a signal related warning.” Simmons Decl. Ex. 78 at TVEYES-003116; *see also id.* Ex. 76 (describing system “to alarm [TVEyes] in advance of any future problems for . . . FNC”).

219. In a July 1, 2011 email, TVEyes’ Chief Technology Officer, James Hayter, explained that TVEyes’ “signal warning system has a few new features,” including that “[i]t will text message [four different TVEyes employees] if there is a signal outage on CNBC, FNC, MSNBC, and CNN.” Simmons Decl. Ex. 79.

220. In an August 1, 2011 email, TVEyes' Chief Technology Officer, James Hayter, wrote that "[w]e will now receive text alerts for . . . fnc . . . fbn" and four other networks. Simmons Decl. Ex. 106; *see also id.* Ex. 80 at TVEYES-002483 (describing July 2011 outage that caused loss of "special breaking news" on FBN).

221. FNC is among the top three most viewed and downloaded channels on TVEyes' service. Simmons Decl. Ex. 70 (RFA Resp. Nos. 386, 399).

222. FBN is among the top ten most viewed and downloaded channels on TVEyes' service. Simmons Decl. Ex. 70 (RFA Resp. Nos. 397, 409).

223. Fox News' content represents over [REDACTED] of the total content viewed on TVEyes' system. Simmons Decl. Ex. 90.

224. Almost [REDACTED] video clips of Fox News' content have been viewed using TVEyes' service. Simmons Decl. Ex. 90.

225. Over [REDACTED] clips of Fox News' content have been downloaded using TVEyes' service. Simmons Decl. Ex. 91.

226. Video clips from the nineteen Registered Works were viewed over 500 times on TVEyes' service. Simmons Decl. Ex. 92.

F. TVEyes' For-Profit Business Model

227. TVEyes is a for-profit corporation. Simmons Decl. Ex. 66 (Ives Dep. (Mar. 20, 2014) 309:3–5 ("Q. Is the TVEyes system a for-profit commercial enterprise? A. Yes.")).

228. TVEyes is a commercial enterprise. Simmons Decl. Ex. 66 (Ives Dep. (Mar. 20, 2014) 309:3–5 ("Q. Is the TVEyes system a for-profit commercial enterprise? A. Yes.")).

229. TVEyes has thousands of subscribers. Simmons Decl. Ex. 119.

230. Most of TVEyes' revenue is generated from annual and monthly subscription fees

paid by its subscribers. Def. Ans. ¶¶ 1, 30, 33, 37; Simmons Decl. Exs. 70 (RFA Resp. No. 87), 64 (Hayter Dep. (Mar. 11, 2014) 42:5–9 (“[Q.] Users pay to access the TVEyes media monitoring suite, right? A. Yes. Q. It’s generally \$500 a month? A. As far as I know, yes.”)), 66 (Ives Dep. (Mar. 20, 2014) 38:20–39:7 (“Q. So how does TVEyes make money today? A. Primarily from offering subscriptions to businesses. Q. Does TVEyes charge its customers \$500 a month to use the service? A. Sometimes. Q. What other pricing models does it have? A. Annual subscription rates, monthly subscription rates, those two constitute the vast majority of all of our revenue.”)).

231. According to TVEyes’ “Profit and Loss” statement, in 2013, the subscription fees paid to TVEyes totaled more than \$6.8 million. Simmons Decl. Exs. 93, 66 (Ives Dep. (Mar. 20, 2014) 226:24–227:8 (“Q. . . . And it says, the first and biggest line item is ‘Sales, Professional Services.’ Do you see that? A. Yes. Q. What is encompassed with that? A. That is primarily subscription sales. Q. For the TVEyes service? A. Yes.”)), *id.* (228:2–7 (“Q. In the first category on this spreadsheet, ‘Sales, Professional Services,’ other than the money that TVEyes receives from its subscribers, is there any other source of income? A. I can’t think of anything.”)).

232. TVEyes’ Sales Partners pay it a portion of the fees collected from their customers, which totaled \$700,000 in 2013. Simmons Decl. Ex. 93, 66 (Ives Dep. (Mar. 20, 2014) 227:9–21 (“Q. And then it says, ‘Sales Partners.’ What would be encompassed in that? A. Those would be partners. Q. What type of partners? A. Partners where we provide data feeds. Q. You would provide the data feed, and you would in return get some profit sharing? A. In some cases it’s profit sharing. Q. What would it be in other cases? A. Licensing, licensing of our software.”)).

233. TVEyes’ ten-day or ten-clip passes are a promotional marketing offer that TVEyes’ offer to potential customers who, according to TVEyes’ CEO, David Ives, are “not

ready to commit to a full subscription.” Simmons Decl. Ex. 66 (Ives Dep. (Mar. 20, 2014) 236:9–16 (“Q. What are ten-day or ten-clip sales? A. They are a promotional marketing offer that some salesmen make to those subscribers who do not want to commit to a monthly or annual subscription. So this is a, this offers an ability -- it offers a paid trial capability to someone who is not ready to commit to a full subscription.”))

234. TVEyes receives tens of thousands of dollars each year from the sale of ten-day or ten-clip passes. Simmons Decl. Exs. 94, 66 (Ives Dep. (Mar. 20, 2014) 235:25–236:8 (“Q. Can you identify that document? A. Yes. Q. What is it? A. My bookkeeper prepared this document at the request of attorneys to determine how much of our total revenue is derived from something we call ten-day or ten-clip sales.”)), *id.* (237:24–238:10 (“Q. . . . [F]or 2013 TVEyes received \$31,000 . . . from revenue due to clip licensing itself, for people who did not purchase TVEyes’ full media monitoring service; is that right? A. It includes ten-day passes, which do give them access to the full service. Q. Well, the document says, ‘Total clip revenue.’ So that was included, right? A. Yes.”)).

235. According to its profit and loss statement, TVEyes’ revenues in 2013 exceeded \$8 million. Simmons Decl. Ex. 93.

236. According to TVEyes’ CEO, David Ives, in 2013, TVEyes’ net profit was approximately \$3 million. Simmons Decl. Ex. 66 (Ives Dep. (Mar. 20, 2014) 27:9–11 (“Q. What was TVEyes’ net profit in 2013? A. Approximately \$3 million.”)).

237. TVEyes’ CEO testified that TVEyes expects its income to continue to rise because TVEyes revenue “has gone up every year for 11 or 12 years.” Simmons Decl. Ex. 66 (Ives Dep. (Mar. 20, 2014) 234:18–235:2 (“Q. Do you have any informal expectations as to whether you expect -- what income you expect to have in 2014? A. I expect it to be higher than

2013, but I don't know to what degree. Q. And why do you expect it to be higher? A. Because our revenue has gone up every year for 11 or 12 years.")).

G. TVEyes' Licenses with Content Owners Other Than Fox News

238. TVEyes entered into a News Content Copyright License Agreement, dated August 25, 2012 with Allbritton Communications Company ("Allbritton") pursuant to which Allbritton granted TVEyes a license to "(a) make digitally stored copies . . . of [Allbritton's] Stations' Content; (b) display excerpts of the Content on [TVEyes'] Internet website to [TVEyes'] subscribing customers, (c) sell, license or otherwise distribute excerpts of such Content in video, DVD or other format; and (d) prepare transcripts of such Content, and display, sell or distribute such transcripts," and TVEyes agreed to pay Allbritton an annual fee. *See* Simmons Decl. Ex. 105 at §§ A.1, B.2.

239. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *See*

Simmons Decl. Ex. 103 at §§ A.1, B.2.

240. TVEyes entered into a News Content Copyright License Agreement, dated September 13, 2012, with Fisher Broadcasting-Oregon TV, LLC (the "Company"), pursuant to which the Company granted TVEyes a license to "(i) record Company's Content, (ii) display excerpts of the Content on [TVEyes'] Internet website to [TVEyes'] subscribing customers, (iii) sell, license or otherwise distribute excerpts of such Content in video, DVD or other format; and

(iv) prepare transcripts of such Content, and display, sell or distribute such transcripts,” and TVEyes agreed to pay the Company an annual fee. *See* Simmons Decl. Ex. 102 at §§ A.1, B.2.

241. TVEyes entered into a News Content Copyright License Agreement, dated September 1, 2013, with Journal Broadcast Group, Inc. (“Journal”) pursuant to which Journal granted TVEyes a license to “(i) record Journal’s Content, (ii) display excerpts of the Content on [TVEyes’] Internet website to [TVEyes’] subscribing customers, (iii) sell, license or otherwise distribute excerpts of such Content in video, DVD or other format; and (iv) prepare transcripts of such Content, and display, sell or distribute such transcripts,” and TVEyes agreed to pay the Journal an annual fee. *See* Simmons Decl. Ex. 104 at §§ A.1, B.2.

242. In a July 2, 2012 email, TVEyes’ CEO, David Ives, wrote that TVEyes was “forced to turn off our Bloomberg monitoring today under threat of a lawsuit from them.” Simmons Decl. Ex. 95 at TVEYES-037017.

243. Before a license agreement between Bloomberg and TVEyes was finalized, TVEyes took Bloomberg’s content off its system from roughly July to the end of October 2012. Simmons Decl. Ex. 66 (Ives Dep. (Mar. 20, 2014) 263:11–17 (“How long did TVEyes take down and not use the Bloomberg content? A. We kept Bloomberg turned off until super storm Sandy that following October. Q. So from roughly July 2012 to the end of October 2012? A. That’s right.”))

244. TVEyes’ use of Bloomberg’s content resumed when the license agreement between the parties almost was finalized. Simmons Decl. Exs. 96, 66 (Ives Dep. (Mar. 20, 2014) 264:14–25 (“Q. There came a time, though, after the heated conversation with Bloomberg’s in-house counsel and Cummings & Lockwood where you entered into discussions with Bloomberg about a license, right? A. We were having discussions prior to that, and

subsequent to that. Q. Did you put the Bloomberg content back up, because you thought that it was more likely you were going to get a license? A. That may have been one of the reasons.”)).

245. TVEyes and Bloomberg entered into a Video Content License Agreement, dated December 13, 2013, pursuant to which, among other things, Bloomberg granted TVEyes a “license” to “use, distribute, reproduce, display, adapt, perform and promote the Content,” and TVEyes agreed to pay Bloomberg a “monthly fee.” Simmons Decl. Ex. 96 at §§ 1.1, 5.1.

246. The Video Content License Agreement between TVEyes and Bloomberg provides that TVEyes “shall ensure” that each clip of Bloomberg content “shall be prominently watermarked throughout the Clip with the following phrase: ‘Not for intranet or website publication. Review copy.’” Simmons Decl. Ex. 96 at § 2.2.1.

247. The Video Content License Agreement between TVEyes and Bloomberg provides that TVEyes “shall ensure” that “The following copyright notice will be included on every Clip: © Bloomberg L.P., All rights reserved.” Simmons Decl. Ex. 96 at § 2.2.4.

248. [REDACTED]
[REDACTED]
[REDACTED] Ashton Decl. ¶ 27, Ex. 31.

249. [REDACTED]
[REDACTED] Williams Decl. ¶¶ 29–30.

250. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

251. TVEyes does not have a license to use Fox News' content. Carry Decl. ¶ 17.

253. Fox News declined TVEyes' request for a license and demanded multiple times that TVEyes stop using its content. Steinberg Decl. ¶¶ 8, 10; Fox News' Complaint dated July 31, 2013 (Dkt. No. 1), Ex. B (Letter from Fox News' counsel to David Ives re "Infringing Use of Fox News Content," dated April, 16, 2013); Simmons Decl. Ex. 85 at TVEYES-009560.

254. TVEyes repeatedly represented to Fox News that it would remove Fox News’ content from its service, but never followed through. Steinberg Decl. ¶¶ 8–11; Simmons Decl. Ex. 66 (Ives Dep. (Mar. 20, 2014) 88:16–20 (“Q. Isn’t it true that TVEyes, despite Fox News’

request that it cease copying and distributing FOX News content, continued to copy and distribute Fox News content? A. Yes.”)).

I. TVEyes Misleads Consumers

255.

Cronin Decl. ¶ 8.

256. There is no disclaimer or indication on the TVEyes’ website that tells consumers that TVEyes has no license from Fox News to use its content. Simmons Decl. Ex. 72 at FOXNEWS0000039; Cronin Decl. ¶ 8.

257.

Ashton Decl. ¶¶

24–35.

258.

Ashton Decl. ¶ 24.

259.

Ashton Decl. ¶ 28, Ex. 32

at EI0001684.

J. TVEyes' Use Harms the Market for and the Value of the Registered Works and TVEyes Competition with Fox News' Business

(i) Harm to Fox News' Market

260. TVEyes threatens the fees that cable operators, satellite services and other multichannel video programming distributors ("MVPDs" or "affiliates") pay to Fox News, which are determined, in part, by ratings. Carry Decl. ¶ 18.

261. TVEyes' subscribers who watch FNC and FBN on TVEyes are not included in Fox News' ratings. Misenti Decl. ¶¶ 12, 16, 19.

262. TVEyes' subscribers overlap with Fox News' viewers. Ashton Decl. ¶¶ 8–9; Simmons Decl. Exs. 119; Williams Decl. ¶ 7.

263. TVEyes' service devalues Fox News' content to Fox News' affiliates, who will seek lower carriage fees as a result. Carry Decl. ¶ 18.

264. TVEyes' use of Fox News' content weakens Fox News' negotiating position for advertising fees and reduces the value of advertisements aired on its channels. Villar Decl. ¶ 8; Carry Decl. ¶ 18.

(ii) Harm to Fox News' Video Clip Licensing Business

265. ITN Source [REDACTED] granting companies the right to use short segments of Fox News' content. Williams Decl. ¶ 25.

266. TVEyes directly competes with and undercuts ITN Source's business. Williams Decl. ¶ 32; Simmons Decl. Ex. 67 (Williams Dep. (Mar. 26, 2014) 23:8–18 [REDACTED])

[REDACTED]

[REDACTED]

[REDACTED].

267. TVEyes damages ITN Source's business because TVEyes is also a business-to-business company marketing to the same types of customers that ITN Source targets, and TVEyes offers them unlimited downloads of high-definition clips for a set monthly price, regardless of its subscribers' use. Williams Decl. ¶ 32.

268. For Fox News' content, Executive Interviews [REDACTED]
[REDACTED]

269. [REDACTED]
[REDACTED]

Ashton Decl. ¶¶ 24, 26, 28, 30–33.

270. This makes it very difficult for Executive Interviews to compete with TVEyes. Ashton Decl. ¶¶ 24, 29, 32, 34.

271. David Ives, TVEyes' CEO, stated in his deposition that a consumer, "happy with the high quality/high definition video clips" provided by TVEyes, would have "no need" for an authorized video clip. Simmons Decl. Ex. 66 (Ives Dep. (Mar. 20, 2014) 83:17–22).

(iii) Harm to Fox News' Digital and Online Business

272. Fox News posts video clips of its content online. Misenti Decl. ¶ 12.

273. Fox News posted 70 separate video clips from the Registered Works. Misenti Decl. ¶ 14.

274. All of the video clips posted on Fox News' websites can be distributed using social media platforms, shared using a link, or displayed on a third-party website using Fox News' proprietary video player, which includes links back to Fox News' websites. Misenti Decl. ¶ 16.

275. TVEyes' CEO, David Ives, stated in his deposition that high-traffic websites receive more online advertising revenue. Simmons Decl. Ex. 66 (Ives Dep. (Mar. 20, 2014)

202:21–25 (“Q. Is it fair to say if you have more traffic to your website, the more advertising revenue you might be able to have? A. Depending on the website, but generally speaking, yes.”)).

276. [REDACTED]

[REDACTED] Misenti Decl. ¶¶ 19, 27.

277. Video clips on TVEyes are susceptible to additional copying and further unlimited, viral distribution. Misenti Decl. ¶ 29, Ex. 63; Simmons Decl. Ex. 66 (Ives Dep. (Mar. 20, 2014) 54:25–55:16 (“Q. And once a subscriber downloads a video, the subscriber can do whatever they want with it, right? A. Theoretically. Q. So a subscriber could forward the video to other people; right? A. Yes. Q. A subscriber could upload the video to YouTube, right? A. Yes. Q. A subscriber could tweet the video or post it on FOX Business, right? A. Yes. Q. A subscriber can put the video in a PowerPoint presentation, correct? A. Yes.”))

278. TVEyes’ system competes with Fox News’ identification of video clips through the Fox News search engine. Misenti Decl. ¶ 18; Simmons Decl. Ex. 64 (Hayter Dep. (Mar. 11, 2014) 317:19–318:4 (“Q. So they can search their keywords across the content TVEyes has recorded? A. Correct, yes. Q. So a user could search the FOX News Channel’s closed captioning for a certain word on a certain day? A. Yes. Q. And then TVEyes then returns the results of that search? A. Correct.”)).

279. TVEyes directly competes with Fox News’ online syndication partners, Yahoo!, Hulu, and YouTube, for video clip viewership by posting the same clips without paying Fox News any licensing fees. Misenti Decl. ¶ 20; Simmons Decl. Ex. 66 (Ives Dep. (Mar. 20, 2014) 115:15–18 (“Q. And isn’t it true that TVEyes does not pay Fox News any money for any use of its content? A. Not to my knowledge, we do not pay.”)).

(iv) Interference with Fox News' Agreements with Affiliates

280.

Carry Decl. ¶ 10.

281.

Carry Decl. ¶ 10.

282.

Carry Decl. ¶ 11.

283. TVEyes makes all of Fox News' content available online

. Carry Decl. ¶¶ 17–20.

(v) Widespread Harm If TVEyes' Use Is Permitted

284. Many newspapers have gone out of business and television news organizations that radically have cut back on their news coverage. Wallace Decl. ¶¶ 9, 45.

285. The audience for the three network evening news broadcasts on a typical day has shrunk from 52 million in 1980 to just 22 million in 2013. Wallace Decl. ¶ 11.

286. As a result of lower audiences, the networks have had to close bureaus, lay off staff, and cover less news. Wallace Decl. ¶ 45.

287. In the cable news industry, MSNBC and CNN have moved away from covering breaking news. Wallace Decl. ¶ 45.

288. TVEyes admits that it is neither a newsgathering organization nor in the business of gathering the news. Simmons Decl. 70 (RFA Resp. Nos. 75, 77), 65 (Bruder Dep. (Mar. 14, 2014) 71:25–72:9 (“Q. Does TVEyes do its own news reporting? A. No. Q. Do they -- would you consider TVEyes to be a content provider? A. You mean, do you mean in terms of creating content and then airing it? Q. Yes. A. No.”)).

289. If TVEyes’ use became widespread with all of Fox News’ content available on the Internet through TVEyes and similar services, Fox News’ authorized affiliates [REDACTED]. Carry Decl. ¶¶ 19, 21.

290. If TVEyes’ use became widespread and Fox News’ online viewership declines, Fox News’ online advertising partners will not pay to advertise on Fox News’ websites. Misenti Decl. ¶ 19.

291. If TVEyes’ use became widespread, companies will not buy video clips from ITN Source or Executive Interviews that they can download directly from TVEyes. Ashton Decl. ¶¶ 24, 26, 28, 30–33; Williams Decl. ¶ 32.

292. TVEyes threatens Fox News’ incentive to make the financial investments to produce news, which it currently can justify because it receives sufficient revenue to offset the costs of its newsgathering and reporting. Carry Decl. ¶ 20; Berg Decl. ¶ 35.

293. Third-party ITN Source’s witness, Mr. Williams, testified:

[REDACTED]

Simmons Decl. Ex. 67 (Williams Dep. (Mar. 24, 2014) 213:6–16) (emphasis added).

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